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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-220
No. 75-221

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioners,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WILLIE STAMPS, *et al.*,
Respondents.

BRIEF OF RESPONDENTS STAMPS, ATKINSON AND STANFIELD IN RESPONSE TO PETITIONS OF LOCAL 223, UTILITY WORKERS UNION OF AMERICA AND LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS FOR CERTIORARI

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SUMMARY

Petitioners, Local 223, Utility Workers Union of America and Local 17, International Brotherhood of Electrical Workers seek

review by Writ of Certiorari of seven determinations made by the Court of Appeals for the Sixth Circuit, below. 1/ The Plaintiffs oppose the grant of the Union Petitions as to all determinations by the Circuit Court of Appeals on the grounds that none is of sufficient importance, or a departure from settled principles such as to warrant issuance of the Writ.

1/ Local 223, only raises 4 issues in its petition. In fact, however, in Issues 2, 3 and 4, Local 17 has raised the same issue that Local 223 raises in Issue 1, i.e., a claim, contrary to the determination of both courts below, that the union-negotiated departmental and job seniority systems did not operate in a discriminatory fashion. Although Local 17 raises the issue of adequacy of class representation as it relates to the ability of plaintiffs to represent those who were discriminated against by Local 17, no argument or authority to support its view is set forth in the Local 17 petition. As we note below, all plaintiffs and members of the affected class were harmed by the racially discriminatory practices of Local 17. Similarly, no authority is cited by either union for the proposition that attorneys' fees should not be awarded, the position of both defendants-unions being that they should not be awarded because neither union is guilty of racial discrimination. As we note below, this position is completely untenable.

ARGUMENT

I.

THE DETERMINATIONS BELOW UPON WHICH PETITIONERS SEEK REVIEW DO NOT WARRANT REVIEW OR FAIL TO RISE TO THE IMPORTANCE REQUIRED FOR THE WRIT.

A. The findings of the District Court, affirmed by the Circuit Court of Appeals, clearly establish discriminatory conduct on the part of both unions as well as the Detroit Edison Company and thus attorneys' fees and other relief were properly awarded against all defendants.

The central theme of the petitions filed by Local 223 and Local 17 is that they were not involved in or party to the pattern of racial discrimination engaged in by the Detroit Edison Company. See, for instance, the Petition for Certiorari in Docket No. 75-220, p. 15 of Local 223 which states that an award of attorneys' fees against Local 223 is "unjustifiable" because it has "conducted itself in an exemplary manner as to the very serious obligation it has to all its members. . ." The findings of the District Court affirmed by the Circuit Court of Appeals, are that Local 223 retaliated against plaintiff by bringing this action and for his civil rights activities engaged in at the Detroit Edison Company, Joint Appendix, Appendix C,

1271-1272, and the following: "Defendant Utility Workers Union, Local 223, has misinformed black members by advising such members that unsuccessful bids involving jobs outside their departments cannot be put through the grievance procedure under the collective bargaining agreement. Black employees have been discouraged from filing grievances and have not sought to use the grievance procedure to obtain relief from discrimination because of their lack of confidence in defendants Local 223 and Detroit Edison Company. Local 223, has insisted upon strict adherence to seniority for black meter readers consigned by that system to undesirable routes when seniority had not been followed uniformally (sic) for white meter readers before blacks were hired. Defendant Local 223, Utility Workers Union of America, and Detroit Edison Company have deliberately gerrymandered seniority districts so as to deny black union members promotional opportunities in the better paying jobs. Defendant Local 223 has negotiated and acquiesced in discriminatory seniority, bidding and posting procedures which have the effect of locking blacks into low opportunity jobs. Defendant Local 223 apparently has never protested Detroit Edison Company's hiring or promotion policies with the Company itself, before any administrative agency -- federal or state; or before any court." Joint Appendix, Appendix C, pp. 1290, 1290-1291.

The Courts below found that blacks

were assigned disproportionately to low opportunity jobs and that high opportunity, better paying jobs - particularly in skilled trades and supervisory classifications - were virtually all white and that this result had been accomplished through a wide variety of discriminatory practices. Joint Appendix, Appendix C, pp. 1271-1278. As the findings relate to both Local 223 and Local 17, they show that both unions had negotiated collective bargaining agreements with the Detroit Edison Company which (1) made it impossible for employees to carry seniority from one bargaining unit or department to another; (2) did not protect the wage rate of an employee who transferred from one department or unit to another, and thus subjected such workers to a reduction of economic benefits; (3) discouraged blacks from applying for high opportunity jobs because of the above mentioned seniority and wage rate practices. Moreover, it was impossible for many blacks to apply for all-white, high opportunity jobs because (1) the jobs were only posted in departments composed exclusively of high opportunity job classifications where virtually no blacks were employed and, thus, blacks were not even aware of such vacancies; (2) in the case of Local 17 the collective bargaining agreement provided that priority for promotion into vacancies was to be given to employees within the unit or department - and, once again, the only employees within the department and unit were practically always

white, 2/ Joint Appendix, Appendix C, 1287-1290. As in all Title VII cases involving discriminatory departmental seniority procedures, 3/ the problem arises out of the

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2/ Contrary to the assertions contained in the Local 17 petition both courts below found that the above-noted procedures negotiated by Local 17 and the Detroit Edison Company discriminatorily excluded blacks who were outside the Local 17 bargaining unit and unlawfully retarded the promotional advance of those few blacks who had been fortunate enough to penetrate this wall of racial discrimination, Joint Appendix, Appendix C, pp. 1277-1278, 1287-1291.

3/ For the first time, in the petition filed with this Court, Local 223 claims that there is "economic justification" for the practices referred to above. This argument -- which has never been advanced to either the District Court or the Circuit Court of Appeals -- is completely unsupported by the record. No evidence of economic justification was ever introduced at the trial level. And even if it was introduced, it is irrelevant as a matter of law because the appropriate legal defense in such circumstances is business necessity and not justification. See e.g. United Papermakers v. United States, 416 F. 2d 980 (5th Cir. 1969).

Similarly Local 223 at pp. 14-15 main-

discriminatory exclusion of blacks from high opportunity jobs. See, e.g., United Papermakers v. United States, supra. In the instant case, those few blacks who were fortunate enough to be hired at any level by the Company were employed for the most part in low opportunity jobs. The procedures contained in the collective bargaining agreements referred to above locked blacks into such jobs -- and both courts below so found.

Of course, blacks were in a substantial minority in all departments because of the pattern of hiring discrimination which was found by the courts below. 4/ Thus, the fact that whites were also hired into low opportunity jobs is irrelevant. The focus of the judiciary in such circumstances is upon the exclusion of blacks from high opportunity jobs. See, e.g., Jones v. Lee

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3/ (cont.) tains for the first time that the company is hiring employees "outside the work force" in preference to "white seniority employees." There is no support in the record for this vague assertion. If Local 223 has a complaint in this regard it should be addressed to the District Court.

4/ Of course, there are areas in the Company where blacks constitute a majority of those assigned to low opportunity jobs. See e.g., Joint Appendix, Appendix C, pp. 1277, 1274-1275.

Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir. 1970); United States v. Bethlehem Steel, 446 F. 2d 652 (2nd Cir. 1971). Whites were not similarly excluded from high opportunity jobs on racial grounds and thus no problem relating to racial discrimination arises from the fact that they, like blacks, have been assigned to low opportunity jobs. Although the courts below also found that Local 17 "aided and abetted" defendant Edison's discriminatory hiring practices, union involvement in the exclusion of blacks from high opportunity jobs is established primarily through the negotiation of the above-mentioned collective agreement procedures. Accordingly, attorney's fees were properly awarded against all defendants, including the Unions.

B. Both unions rely upon seniority precedent which has no applicability to the facts set forth above.

In their petitions to this Court both unions rely upon law which has nothing whatsoever to do with the facts of the instant case. For instance, in the Petition for Certiorari Local 223, pp. 8-10, Local 223 places great stress and emphasis upon the decisions of the Third, Fifth and Seventh Circuit Courts of Appeals in Jersey Central and Light v. International Brotherhood of Electrical Workers, 508 F. 2d 687 (3rd Cir. 1975); Watkins v. United Steelworkers, 516 F. 2d 41 (5th Cir. 1975); and Waters v.

Wisconsin Steelworkers, 502 F. 2d 1309 (7th Cir. 1974). However, in sharp contrast to the facts of the instant case, these cases involve the so-called "last hired - first fired" issue where minority employees seek protection against layoffs on the theory that layoffs trigger an alleged discriminatory impact where minorities have been hired recently. These cases have nothing whatsover to do with the instant case because they attack plantwide seniority and the issue here involves departmental seniority discrimination which fences blacks out of high opportunity jobs - practices which have been declared by all circuit courts of appeals to be unlawful, 5/ including the courts below.

Similarly, Local 17 relies upon the grant of certiorari by this Court in Franks v. Bowman, 495 F. 2d 398 (5th Cir. 1974), and while resolution of the issues presented in Franks arguably may have a bearing upon the grant of seniority credits to rejected applicants by the courts below, this issue is not raised in either Petition. Both Petitions make it clear that their attack

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5/ See e.g., United Papermakers v. United States, supra; United States v. Bethlehem Steel, supra; Jones v. Lee Way Motor Freight, Inc., supra; Robinson v. P. Lorrilard, 444 F. 2d 791 (4th Cir. 1971). See cases cited by District Court in conclusions 6-13, Joint Appendix, Appendix C, 1306-1309.

upon the rulings below is predicated upon the view that both courts erred when concluding that departmental seniority operated in a discriminatory fashion against incumbents in this case - a view contradicted by all applicable authority. Accordingly, the cases relied upon by the unions are inapplicable because (1) the facts of the instant case do not involve layoffs in any shape or form in contrast to the authority relied upon by the unions and (2) the Franks issue has not been placed before this Court in either Petition filed by the Unions in this case.

Finally, the Unions claim that they have not discriminated because they are not involved in the hiring decisions of the employer. However, nothing in the District Court's order or the Circuit Court's opinion requires either union to do anything about hiring whatsover. The District Court's order is completely silent about union obligations in the hiring area. Thus, nothing is presented to this Court relating to such subject matter.

It is true that Local 17 was found to have aided and abetted Edison's discriminatory hiring practices. It is also true that the opinions of both the courts below concluded that the failure of the Unions to press Edison to change discriminatory hiring policies and, in the case of Local 17, its involvement in the hiring discrimination itself, violated both Title VII and the

National Labor Relations Act duty of fair representation obligation. No cases are cited by either Union which are contrary to the view expressed in the District Court and Circuit Court of Appeals opinions. In any event, inasmuch as the District Court's order does not address the issue, the Unions are in the position of inviting this Court to resolve an issue which was not definitively resolved below.

C. Temporary remedial quotas were appropriate under the circumstances of this case.

Both Local 223 and Local 17, like Detroit Edison Company, challenge the imposition of temporary remedial quotas which were affirmed below. Like the Detroit Edison Petition, we note once again that defendants in the instant litigation inveigh "eloquently against the evils of race discrimination with a fervor characteristic of the recent convert." Plaintiff's Petition for Certiorari, p. 4. Here deliberate and malicious racial discrimination, in addition to the kind of discriminatory practices condemned by Griggs v. Duke Power Company, 401 U.S. 424 (1971), and the departmental seniority cases, coupled with an almost complete absence of blacks from skilled trades and supervisory positions, make it clear that the temporary remedial quotas imposed in this case were an appropriate form of relief for the courts below to

fashion. In this connection, we refer the Court to our Brief in response to the Petition of Detroit Edison Company, pp. 4-8, and the cases cited therein. The fact that the remedy complained of by Local 223 and Local 17 fits comfortably within the confines of well-settled precedent has been amply demonstrated not only by the authority which we cited in our previous Brief, but also by this Court's denial of certiorari in connection with a decision by the Ninth Circuit providing for temporary remedial quotas even where the racial discrimination was unintentional, and in no way comparable to the egregious behavior engaged in by all three defendants in this litigation. See Alioto v. Western Addition Community Organization, No. 75-309, December 8, 1975.

CONCLUSION

For the reasons stated above, as well as in our Brief in response to Petition of Detroit Edison Company for certiorari, the Writ of Certiorari should be denied as to all issues raised by Local 223 and Local 17.

Respectfully submitted,

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